IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Examiner	:	Esther Okezie
Art Unit	:	3652
Applicant	:	Paul Lindberg
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APPEAL BRIEF

This is an appeal from a final rejection of claims 2, 4-5, 7-13 and 16-20 by Examiner Okezie.

I. Real Party In Interest

The real party in interest is Paul Lindberg, 2587 Wickersham Road, Charlevoix, Michigan 49720.

II. Related Appeals and Interferences

There are no related appeals, interferences, or judicial proceedings which may be related to, directly affect or be directly affected by, or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

Claims 2, 4-5, 7-13 and 16-20 are pending, finally rejected, and being appealed.

IV. Status of Amendment

There has been no amendment filed after the final rejection.

V. Summary of Claimed Subject Matter

The present invention relates to a device for manipulating landscaping materials, such as rocks, boulders and other large materials. The claimed invention can be generally classified as tongs in the sense that it includes pivotally interconnected arms that function in a tong-like manner. The tongs of the present invention are specially configured for the specific purpose of manipulating landscaping.

As defined in independent claim 2, the present invention is directed to a device for lifting/manipulating landscaping and other like materials having a first arm with an upper portion, a pivot portion and a lower portion; and a second arm with an upper portion, a pivot portion and a lower portion. The pivot portion of the first arm is pivotally connected to the pivot portion of the second arm. At least one of the pivot portions is offset, whereby the upper portion and the lower portion of the first arm extend along a common plane with the upper portion and the lower portion of the second arm. At least a portion of the upper portion of the first arm follows a first radius of curvature having a center on an exterior side of the first arm.

As defined in independent claim 16, the present invention is directed to a device for lifting and manipulating landscaping and other like materials. The device includes a first arm, a second arm, a pivot joint pivotally interconnecting the first arm and the second arm. The pivot joint is configured such that the upper portion and the lower portion of the first arm and the upper portion and the lower portion of the second arm extend through a common plane. The

device also includes a lift ring, a first shackle interconnecting the first arm to the lift ring, and a second shackle interconnecting the second arm to the lift ring. The device also includes a jaw affixed to each arm where each jaw extends substantially perpendicularly to a longitudinal extent of the arm it is affixed to. Each of the jaws includes teeth oriented along a curve.

As can be seen, the pending claims recite a device having first and second arms with upper and lower portions that extend in a common plane. The alignment between the upper and lower portions of the two arms addresses a number of deficiencies inherent in devices with misaligned arms. Misaligned arms can result in unwanted torque that can damage the pivot joint and may cause undesirable twisting of the object being lifted.

VI. Grounds of Rejection to be Reviewed on Appeal

Ground A: Whether claims 2 and 4-5 are patentable under 35 U.S.C. 103(a) over the combination of European Patent 790,211 ("Caille") and U.S. Patent 5,050,921 ("Hultquist").

Ground B: Whether claims 7-8 are patentable under 35 U.S.C. 103(a) over the combination of Caille, Hultquist and U.S. Patent 1,468,344 ("Eckert").

Ground C: Whether claims 9-10 are patentable over the combination of Caille, Hultquist, Eckert and Japanese Patent 405286682 ("Shigemitsu").

Ground D: Whether claims 11 and 12 are patentable under 35 U.S.C. 103(a) over the combination of Caille, Hultquist, Eckert, Shigemitsu and U.S. Patent 5,056,845 ("Cook").

Ground E: Whether claim 13 is patentable under 35 U.S.C. 103(a) over the combination of Caille, Hultquist and U.S. Patent 5,364,147 ("Dickey").

Ground F: Whether claim 16 is patentable under 35 U.S.C. 103(a) over the combination of Caille and Eckert.

Ground G: Whether claims 17 and 18 are patentable under 35 U.S.C. 103(a) over the combination of Caille, Eckert and Shigemitsu.

Ground H: Whether claim 19 is patentable under 35 U.S.C. 103(a) over the combination of Caille, Eckert and Hultquist.

Ground I: Whether Claim 20 is patentable under 35 U.S.C. 103(a) over the combination of Caille, Eckert, Hultquist and Dickey.

VII. Argument

Appellant respectfully submits that the subject matter of the pending claims is patentable over the art of record. Although the prior art discloses a wide variety of tong-like structures, it is respectfully submitted that the subject matter of the claims is not anticipated by or obvious in view of the prior art. It is worthwhile to note that a wide variety of patents have been granted to different tong-like devices configured for specific applications despite their general similarity. It is respectfully submitted that the distinctions between the claimed invention and the prior art devices are at least as material as the distinctions between the various patented prior art devices.

A. §103(a) Obviousness Rejection Based on the Combination of Caille and Hultquist

Claims 2 and 4-5 were rejected under 35 U.S.C. §103(a) over the combination of Caille and Hultquist. Appellant respectfully submit that this rejection is improper and should be reversed.

Hultquist is directed to a clamp with a detachable cam. The Hultquist device includes a pair of clamping members that are pivotally connected by a bolt or pin. Each clamping member is planar following a series of bends through a single plane. The two clamping members are pivotally interconnected in a straight overlapped configuration. As a result, each clamping member extends through separate planes that overlap and are not in alignment. Rather, they are misaligned (like scissors) moving in different planes offset by the thickness of the tongs. The misalignment between the tongs may create an undesirable degree of torque. This torque may have a negative affect on the pivot joint and may cause undesirable twisting of the object being lifted or otherwise manipulated. The Hultquist device includes a cam member that holds the clamping member in the clamped position. The cam member is mounted to the face of one of the clamping members so that it is aligned with the other clamping member. The lower end of each clamping member terminates in a face clamping jaw. The jaws are not laterally extended, but are instead the width of the clamping members.

Appellant agrees with the Examiner that Caille:

> "does not disclose the upper portions of the arms following a radius of curvature having a center on an exterior side of the arms so that the arms have a somewhat "S" shape having a lower portion extending along a radius of curvature opening inwardly and an upper portion extending along a radius of curvature opening outwardly." Office Action 3/27/2007, Pg. 3.

There is no teaching, suggestion or motivation in any of the prior art of record to combine Hultquist and Caille. The Examiner cites the following passage and states that it "provides motivation for this arm shape."

> "By opening the jaws to a wider position, the jaws can be extended around an enlarged object to reach another object positioned behind the first object. Also, sometimes an object includes an enlarged portion which must be reached around with a clamp in order to reach another portion of the object which must be gripped by the clamp." Hultquist Col. 1, Ln. 64 – Col. 2 Ln. 2.

Applicant interprets this passage to describe the benefits associated with detaching the Hultquist cam in order to open the jaws to a wider position. This passage does not provide any teaching, suggestion or motivation to combine the "S" shaped arms of Hultquist with the aligned, planar arm, configuration of Caille.

A §103 rejection based upon a modification of a reference that destroys the intent, purpose or function of the invention disclosed in the reference, is not proper and the prima facie case of obviousness cannot be properly made. In short, there would be no *technological motivation* for engaging in the modification or change. To the contrary, there would be a disincentive. *In re Gordon*, 221 USPQ 1125 (Fed. Cir. 1984.) Appellant submits that combining Caille and Hultquist would destroy the intended function of Hultquist. The Hultquist clamping members must be misaligned to function properly. Specifically, the Hultquist configuration allows the jaws to open extra wide by having the upper portion of arm 12 slide *past* the lower portion of arm 14 (See Hultquist Fig. 5, reproduced below). This would not be possible in a planar configuration, like that used in Caille, the lower portions of one arm cannot slide past the

upper portion of another arm because they are in the same plane. Therefore, there is no motivation to combine the "S" shaped misaligned arms of Hultquist with the aligned configuration of Caille.

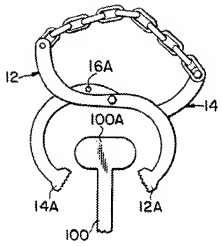

FIG.5

The Examiner has argued that "Caille is modified by Hultquist not the alternative. The cam members of Hultquist have nothing to do with the rejection." Appellant respectfully disagrees. "[I]t is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art." *In re Wesslau*, 147 USPQ 391 (CCPA 1965). The "S" shaped arms of Hultquist contribute to its ability to open wide, using its scissor like configuration. A person of ordinary skill in the art would not have singled out the "S" shaped arms of Hultquist for combination with another reference without some teaching, suggestion or motivation.

B. §103(a) Obviousness Rejection Based on the Combination of Caille, Hulquist and Eckert

Claims 7-8 were rejected under 35 U.S.C. §103(a) over the combination of Caille, Hultquist and Eckert. Appellant respectfully submits that this rejection is improper and should be reversed.

The combination of Caille and Hultquist does not disclose "a first jaw affixed to said first arm, said jaw extending substantially perpendicularly to a longitudinal extent of said first arm, wherein said jaw includes a plurality of teeth" as recited in claim 7; or a "plurality of teeth are oriented along a radius of curvature having a center on an interior side of said first arm" as recited in claim 8.

Eckert is directed to a pipe lifting device. The Eckert device includes a pair of levers that are pivotally connected by a bolt in a tong-like arrangement. The Eckert device is specially configured to grip a long pipe from the side. Accordingly, the Eckert device includes jaws that extend from only one side of the levers. Eckert includes flat levers that are interconnected at a straight overlap. As a result, the levers of Eckert are misaligned and do not extend in a common plane.

There is no teaching, suggestion or motivation in any of the prior art of record to combine Caille, Hultquist and Eckert. The Examiner has failed to make a prima facie case of obviousness because there was no teaching, suggestion or motivation cited for why a person of ordinary skill in the art would combine these references.

Further, Appellant submits that modifying the combination of Caille and Hultquist to include an Eckert jaw would destroy the intended function of the jaw. The Eckert jaw 14 is set off to one side of the arms 10 so that a pipe can be captured in the jaw along side the arms. In Caille, elements 12, 13 are at the center of the arms 6, 7 not offset to either side. If the Eckert jaw replaced elements 12, 13 of Caille, it could not function as a pipe lifter because the pipe would be obstructed by the arms. In other words, the jaws of Eckert rely on the offset relationship between the jaws and arms to function.

C. §103(a) Obviousness Rejection Based on the Combination of Caille, Hultquist, Eckert and Shigemitsu

Claims 9-10 were rejected under 35 U.S.C. §103(a) over the combination of Caille, Hultquist, Eckert and Shigemitsu. Appellant respectfully submits that this rejection is improper and should be reversed.

Appellant agrees with the Examiner that neither Callie, Hultquist or Eckert "disclose the jaw manufactured from a segment of angle iron having a first leg and a second leg and said plurality of teeth being defined on said first leg" as recited in claim 9. 03/27/2007, Office Action, Pg. 4.

Shigemitsu is directed to device for lifting a concrete block. The device includes a pair of arms that are pivotally interconnected in a tong-like arrangement. Each arm is essentially flat (or planar) having two straight sections extending from opposite sides of a bend. The two arms are overlapped and joined by a pivot pin. The Shigemitsu device includes jaws that are specially configured to fit around the outside profile of a concrete block.

Applicant respectfully submits that Shigemitsu does nothing to overcome the deficiencies of Caille, Hultquist and Eckert. None of the references teach or suggest a jaw manufactured from a segment of angle iron having a plurality of teeth. Accordingly, no combination of Caille, Hultquist, Eckert and Shigemitsu could result in the subject matter of claim 9 and 10.

Further, Appellant submits that modification of the combination of Caille, Hultquist and Eckert to include the Shigemitsu jaw would destroy the intended function of the jaws. The Shigemitsu jaws 14 are for lifting concrete blocks. They include elements 10a and 10b which make the jaws unsuitable for other purposes, such as lifting pipes in Eckert.

It is further submitted that there is no motivation in any of the prior art of record for combining these references.

Claim 10 depends from claim 9 and is allowable for at least the reasons stated above in connection with claim 9.

D. §103(a) Obviousness Rejection Based on the Combination of Caille, in view of Eckert and Shigemitsu and Cook

Claims 11-12 were rejected under 35 U.S.C. §103(a) over the combination of Caille, Hultquist, Eckert, Shigemitsu and Cook. Appellant respectfully submits that this rejection is improper and should be reversed. Claims 11 and 12 ultimately depend from independent claim 2 and should be allowable for at least the reasons stated above in section A. Cook does not provide any motivation for combining it or any of the other references.

E. §103(a) Obviousness Rejection Based on Caille, Hultquist and Dickey

Claims 13 was rejected under 35 U.S.C. §103(a) over the combination of Caille, Hultquist and Dickey. Appellant respectfully submits that this rejection is improper and should be reversed.

Neither Callie nor Hultquist disclose "handles mounted on the lower portion of the arms" as recited in claim 13. The Examiner asserts that reference 44 on the lower section of arm 2 of Caille "appears to be a handle." If the Examiner has reason to believe that element 44 is a handle, such as access to an English translation, Appellant is unaware of any such disclosure. As it stands, Appellant cannot ascertain what reference 44 is merely from the figures.

Dickey is directed to a device for lifting railroad timber. The device includes four arms (essentially two pair of arms) that are interconnected in a manner that permits the arms to close on a railroad timber. The Dickey arms are *not* connected in a conventional tong-like manner. Instead, the arms are connected to opposite ends of a crossbar. One pair of arms is pivotally connected to one end of the crossbar and the other pair of arms is pivotally connected to the opposite end of the crossbar. The crossbar is selected to have a length that is approximately the size of the object to be lifted. As a result, different crossbars are required to lift objects of different widths. The spacing between the arms is different such that one pair of arms can be fitted within the other pair of arms.

Claim 13 recites that each arm has a handle and that the handle is "positioned perpendicular to said common plane." Neither Caille, Hultquist, Dickey nor any combination thereof show two handles each perpendicular to the common plane as recited in claim 13.

Further, Applicant submits that there is no motivation in any of the prior art of record for combining these references to teach the subject matter of claim 13.

F. §103(a) Obviousness Rejection Based on the Combination of Caille and Eckert

Claim 16 was rejected under 35 U.S.C. §103(a) over the combination of Caille and Eckert. Appellant respectfully submits that this rejection is improper and should be reversed.

Caille does not disclose that each jaw has "a plurality of teeth ... oriented along a curve" as recited in claim 16.

There is no teaching, suggestion or motivation in any of the prior art of record to combine Caille and Eckert. The Examiner has failed to make a prima facie case of obviousness because there was no teaching, suggestion or motivation cited for why a person of ordinary skill in the art would combine these references.

Appellant submits that modifying Caille to include an Eckert jaw would destroy the intended function of the jaw. The Eckert jaw 14 is set off to one side of the arms 10 so that a pipe can be captured in the jaw along side the arms. In Caille, elements 12, 13 are at the center of the arms 6, 7 not offset to either side. If the Eckert jaw replaced elements 12, 13 of Caille, it could not function as a pipe lifter because the pipe would be obstructed by the arms. In other words, the jaws of Eckert rely on the offset relationship between the jaws and arms to function.

G. §103(a) Obviousness Rejection Based on the Combination of Caille, Eckert and Shigemitsu

Claims 17-18 were rejected under 35 U.S.C. §103(a) over the combination of Caille, Eckert and Shigemitsu. Appellant respectfully submits that this rejection is improper and should be reversed.

Neither Callie nor Eckert disclose that each of the jaws "is manufactured from a segment of angle iron having a first leg and a second leg, said plurality of teeth being defined in said first leg" as recited in claim 17.

As discussed above, Shigemitsu is directed to device for lifting a concrete block with jaws that are specially configured for that purpose. Appellant respectfully submits that Shigemitsu does nothing to overcome the deficiencies of Caille and Eckert. None of these references teach or suggest a jaw manufactured from a segment of angle iron having a plurality of teeth. Accordingly, no combination of Caille, Eckert and Shigemitsu could result in the subject matter of claim 17.

Further, Appellant submits that modification of the combination of Caille and Eckert to include the Shigemitsu jaw would destroy the intended function of the jaws. The Shigemitsu jaws 14 are for lifting concrete blocks. They include elements 10a and 10b which make the jaws unsuitable for other purposes, such as lifting pipes in Eckert.

It is further submitted that there is no motivation in any of the prior art of record for combining these references.

Claim 18 depends from claim 17 and is allowable for at least the reasons stated above in connection with claim 17.

H. §103(a) Obviousness Rejection Based on the Combination of Caille, Eckert and Hultquist

Claim 19 was rejected under 35 U.S.C. §103(a) over the combination of Caille, Eckert and Hultquist. Appellant respectfully submits that this rejection is improper and should be reversed.

Neither Caille nor Eckert disclose arms that are "'S' shaped with ... upper portion extending along a radius of curvature opening outwardly" as claimed in claim 19. There is no teaching, suggestion or motivation in any of the prior art of record to combine Hultquist, Eckert and Caille. The Examiner cites the same lines in Hultquist discussed above in section A, stating that the passage "provides motivation for this arm shape." Appellant respectfully disagrees. As discussed above, that passage does not provide any teaching, suggestion or motivation to combine the "S" shaped arms of Hultquist with the aligned configuration of Caille.

Further, Appellant submits that combining Caille and Hultquist would destroy the intended function of Caille. The Hultquist clamping members must be misaligned to function properly. Therefore, there is no motivation to combine the "S" shaped misaligned arms of Hultquist with the aligned configuration of Caille.

I. §103(a) Obviousness Rejection Based on the Combination of Caille, Eckert and Hultquist

Claim 20 was rejected under 35 U.S.C. §103(a) over the combination of Caille, Eckert, Hultquist and Dickey. Appellant respectfully submits that this rejection is improper and should be reversed.

Neither Callie, Eckert nor Hultquist disclose "handles positioned perpendicular to said common plane" as recited in claim 20. Neither Caille, Eckert, Hultquist, Dickey nor any combination thereof show a handle perpendicular to the common plane as recited in claim 20.

Further, Applicant submits that there is no motivation in any of the prior art of record for combining these references to teach the subject matter of claim 20.

CONCLUSION

In summary, the Examiners' rejections under 35 U.S.C. 103(a) are improper and should be reversed.

Respectfully submitted,

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VIII. Claims Appendix

1. (Cancelled)

2. (Previously Presented) A device for lifting/manipulating landscaping and other like materials, comprising:

a first arm having an upper portion, a pivot portion and a lower portion, said upper portion of said first arm and said lower portion of said first arm extending in a common plane;

a second arm having an upper portion, a pivot portion and a lower portion, said pivot portion of said first arm pivotally connected to said pivot portion of said second arm, said upper portion of said second arm and said lower portion of said second arm extending in said common plane;

wherein at least one of said pivot portion of said first arm and said pivot portion of said second arm is offset from said common plane an amount selected such that said upper portion and said lower portion of said first arm and said upper portion and said lower portion of said second arm extend in said common plane; and

wherein at least a portion of said upper portion of said first arm follows a first radius of curvature having a center on an exterior side of said first arm.

3. (Cancelled)

4. (Previously Presented) The device of claim 2 wherein at least a portion of said lower portion of said first arm follows a second radius of curvature having a center on an interior side of said first arm, and wherein at least a portion of said upper portion of said second arm follows a third radius of curvature having a center on an exterior side of said second arm and at least a

portion of said lower portion of said second arm follows a fourth radius of curvature having a center on an interior side of said second arm.

5. (Original) The device of claim 4 wherein said first arm is pivotally connected to said second arm by a pivot element; and

wherein said first arm transitions between said first radius of curvature and said second radius of curvature in approximate alignment with said pivot element.

6. (Cancelled)

7. (Previously Presented) The device of claim 1 further comprising a first jaw affixed to said first arm, said jaw extending substantially perpendicularly to a longitudinal extent of said first arm, wherein said jaw includes a plurality of teeth.

8. (Original) The device of claim 7 wherein said plurality of teeth are oriented along a radius of curvature having a center on an interior side of said first arm.

9. (Original) The device of claim 8 wherein said jaw is manufactured from a segment of angle iron having a first leg and a second leg, said plurality of teeth being defined in said first leg.

10. (Previously Presented) The device of claim 9 wherein said arms are moveable between a first fully open position and a second closed position; and

wherein said jaw is mounted to said first arm such that said first leg of said first jaw extends along a substantially horizontal plane when said arms are in said first fully open position.

11. (Original) The device of claim 10 further comprising a pair of reinforcing plates interconnected between said first jaw and said first arm, said reinforcing plates being disposed on opposite sides of said first arm.

12. (Original) The device of claim 11 wherein said reinforcing plates extend between said second leg and said first arm.

13. (Previously Presented) The device of claim 1 further comprising a handle mounted to each of said arms, positioned perpendicular to said common plane.

14. (Cancelled)

15. (Cancelled)

16. (Previously Presented) A device for lifting and manipulating landscaping and other like materials, comprising:

a first arm having an upper portion and a lower portion;

a second arm having an upper portion and a lower portion;

a pivot joint pivotally interconnecting said first arm and said second arm, said pivot joint configured such that said upper portion and said lower portion of said first arm and said upper portion and said lower portion of said second arm extend in a common plane;

a lift ring;

a first shackle interconnecting said first arm to said lift ring;

a second shackle interconnecting said second arm to said lift ring;

a first jaw affixed to said first arm, said first jaw extending substantially perpendicularly to a longitudinal extent of said first arm;

a second jaw affixed to said second arm, said second jaw extending substantially perpendicularly to a longitudinal extent of said second arm;

wherein each of said jaws includes a plurality of teeth oriented along a curve.

17. (Previously Presented) The device of claim 16 wherein each of said jaws is manufactured from a segment of angle iron having a first leg and a second leg, said plurality of teeth being defined in said first leg.

18. (Original) The device of claim 17 wherein said arms of moveable between a first fully open position and a second closed position; and

wherein said first jaw and said second jaw are mounted to said first arm and said second arm such that said first leg of said first jaw and said first leg of said second jaw extend along a substantially horizontal plane when said arms are in said first fully open position.

19. (Previously Presented) The device of claim 16 wherein each of said first arm and said second arm are somewhat "S"-shaped with said lower portion extending along a radius of curvature opening inwardly and said upper portion extending along a radius of curvature opening outwardly.

20. (Original) The device of claim 19 further comprising a first handle mounted to said lower portion of said first arm and a second handle mounted to said lower portion of said second arm, each handle positioned perpendicular to said common plane.

21. (Cancelled)

IX. Evidence Appendix

There is no evidence relied upon in this Appeal that need be appended to this Brief.

X. Related Proceedings Appendix

There are no decisions rendered by a court or the Board in any proceeding identified pursuant to 37 C.F.R. §41.37(c)(1)(ii).